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No. 75-910

In the Supreme Court of the United States

OCTOBER TERM, 1975

VICENTE RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court improperly instructed the jury on the burden of proof necessary to convict him of receiving a firearm that previously had traveled in interstate commerce, in violation of 18 U.S.C. App. 1202.

After a jury trial in the United States District Court for the Western District of Texas, petitioner, who had previously been convicted of a felony, was convicted on one count of receiving a firearm that had traveled in interstate commerce prior to its receipt, in violation of 18 U.S.C. App. 1202(a).[1]

The evidence showed that on October 24, 1971, petitioner was arrested in San Antonio, in the Western Dis-

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[1]Petitioner was acquitted on the second count, charging receipt of another firearm.

trict of Texas, for driving while intoxicated; he was carrying a loaded 38 caliber semi-automatic pistol (Tr. 222-224, 231-232). It was stipulated that the firearm had been shipped from Buffalo, New York to Fort Worth, Texas, in May 1971, and that about two months later it had been shipped to a dealer in San Antonio (Tr. 46-47). The evidence further showed that in September 1971, Eleazar Sanchez purchased the firearm from the dealer, and shortly thereafter traded it to a person known to him as "Toto" (Tr. 48-50, 87, 90). It was stipulated that petitioner had been convicted of a federal felony prior to the shipment of the firearms from New York (Tr. 47).

Petitioner contends that the court's venue instruction, which stated that in order to convict, the jury must find by a preponderance of the evidence that petitioner committed the offense in the Western District of Texas, permitted the jury also to find by only a preponderance of the evidence that petitioner received the firearm after its interstate movement.

18 U.S.C. App. 1202(a) makes it illegal for a convicted felon to receive "in commerce or affecting commerce * * * any firearm." The government meets its burden "if it demonstrates that the firearm received has previously traveled in interstate commerce." *United States* v. *Bass*, 404 U.S. 336, 350. In the instant case the court properly instructed the jury as follows (Tr. 356-357):

> [T]he United States must establish beyond a reasonable doubt, as to each count, each of the following propositions:
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> * * * * * *
>
> 2. That on or about [September 15, 1971 and October 24, 1971] * * * [petitioner] knowingly received the firearm referred to in the relevant count of the indictment; and

> 3. That prior to the [above] dates * * * said firearm had previously been in commerce or affecting commerce, that is to say the firearm had previously traveled in interstate commerce.

The court then instructed the jury that if it found beyond a reasonable doubt that petitioner committed the offense, it could not convict unless it found by a preponderance of the evidence that he had committed the offense in the Western District of Texas, where venue had been laid (Tr. 357-358).[2]

Contrary to petitioner's contention, the venue instruction did not permit the jury to find by only a preponderance of the evidence that petitioner received the firearm after it had traveled interstate. Rather, the jury was instructed that it should consider venue only if it found beyond a reasonable doubt that petitioner committed the offense. The court carefully and correctly instructed the jury that it could find that petitioner committed the offense only if it found beyond a reasonable doubt, *inter alia*, that he received the firearm on or about a given date and that before that date the firearm had traveled in interstate commerce.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General,

FEBRUARY 1976.

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[2]Venue may be proven by a preponderance of the evidence. See, *e.g.*, *Simpson* v. *United States*, 229 Fed. 940 (C.A. 9).